Filed 10/2/03 Estate of Murphy CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re Estate of GARRETSON B. MURPHY, Deceased.	H025434 (Santa Clara County Super. Ct. No. 1-02-PR150968)
JULIE L. MURPHY, et. al., Petitioners and Appellants, v. THOMAS D. MURPHY, et. al., Objectors and Respondents.	

This is the second appeal brought by Julie Murphy from superior court orders concerning the probate estate of her husband, Garretson Murphy. The order she challenges on this occasion denied her petition to deem her a pretermitted heir and denied her claim as a creditor to the decedent's house. We will affirm the order.

Background

In the first appeal (H022492), appellant sought review of an order denying her petition to confirm that the residence she had occupied with the decedent was community property belonging to her as the surviving spouse. We held that Garretson Murphy had been obligated under a contract to make a will leaving the "Fernwood Avenue residence" to his son Thomas D. Murphy and Thomas's half-brother Timothy Malley, who is deceased. Thomas D. Murphy and the heirs of Timothy Malley (the Murphy

beneficiaries) were therefore entitled to quasi-specific performance of the decedent's promise, and appellant was deemed to hold the property by way of a constructive trust in their favor. The remittitur in that appeal issued on February 20, 2002.

On May 8, 2002, appellant was appointed administrator for the decedent's estate. On September 4, 2002, she filed a petition asking the court to declare her a pretermitted spouse under Probate Code section 21610.[1] Appellant complained that the Murphy beneficiaries had entered into a transaction to sell the residence even before the judgment in the prior case became final. She argued that at this point the probate court was obligated to treat the residence as an estate asset "as though a will existed devising the property," and the sale could not be completed except through a proceeding in administration. Appellant also filed a "Creditor's Claim," seeking reimbursement for her contributions to the Fernwood Avenue residence. Thomas D. Murphy objected to these claims.

Citing *Estate of Turino* (1970) 8 Cal.App.3d 642, the court first ruled that the constructive trust imposed on the residence was part of the probate estate and therefore subject to administration. Appellant, however, was not a pretermitted heir, as there was no "testamentary instrument" to which section 21610 would apply. Consequently, the court ruled, appellant held the property only as a trustee for the Murphy beneficiaries, and the sale of the property would not be undone. As for appellant's creditor's claim, it was "way too late."

Discussion

It is difficult to ascertain the nature of the error appellant complains of because she does not specifically identify it. Her opening brief duplicates her points and authorities before the superior court, including the assertion that the superior court has jurisdiction

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[1] All further statutory references are to the Probate Code unless otherwise specified.

and an argument that was successful below (the claim that the Murphy beneficiaries' interest is subject to probate administration).

Appellant appears to maintain her position that she is a pretermitted heir under section 21610.[2] She expressly relies on "the assumption that a will exists but does not name [her]." In her view, this statute is applicable because "a contract to make a will means just that; this Court is to now proceed as if the DECEDENT had died testate with a will that left his entire current interest in the Fernwood Ave residence to the MURPHY SONS." Furthermore, she argues, section 21610 applies even if there is not a will.

Appellant's position cannot succeed. She plainly cannot invoke section 21610 because this is not a situation involving a testamentary instrument. Garretson Murphy died *intestate*. He should have executed a will in his son and stepson's favor, but he did not. The only consequence of his failure to act was that the Murphy beneficiaries were entitled to quasi-specific performance of the decedent's promise and the imposition of a constructive trust on the affected property. This was the result we decided in the first appeal, and no resort to an inapplicable statute now will convert the estate assets into testamentary gifts. Nor does section 6401 help appellant; to apply that statute, which prescribes a surviving spouse's share upon intestate succession, would plainly contravene the prior determination that she has no legal claim to any share of the Fernwood Avenue residence.

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[2] Section 21610 states: "Except as provided in Section 21611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the omitted spouse shall receive a share in the decedent's estate, consisting of the following property in said estate: [¶] (a) The one-half of the community property that belongs to the decedent under Section 100. [¶] (b) The one-half of the quasi-community property that belongs to the decedent under Section 101. [¶] (c) A share of the separate property of the decedent equal in value to that which the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one-half the value of the separate property in the estate."

Appellant also renews her claim for reimbursement of her contributions to the Fernwood Avenue residence. She does not dispute respondents' observation that she filed her claim for reimbursement more than one year after Garretson Murphy's death, beyond the limitations period prescribed by Code of Civil Procedure section 366.2. Instead, she argues that this statute did not apply because her cause of action did not accrue until the conclusion of the litigation in H022482. She also resorts to equity -- in particular, "[f]undamental principles of estoppel." She contends that "her attendant equitable rights flow from the previous decision of the Courts. The Courts sitting in equity could not possibly have planed [*sic*] to create an equable [*sic*] right which, in turn, resulted in the termination of yet anothers' [*sic*] then existing rights." She further asserts that she has an "equitable lien" on the residence.[3]

We disagree that Code of Civil Procedure section 366.2 bars appellant's claim for reimbursement. The language of section 366.2 indicates that it was intended to apply to liabilities that already existed at the time of death. Appellant's claim did not exist before Garretson Murphy's death.

We need not further decide whether equitable estoppel also makes appellant's "Creditor's Claim" timely, because appellant does not present any substantive ground for reversal in any event. In her claim she sought reimbursement of community and separate funds expended for the benefit of the residence, which was Garretson's separate property. Family Code section 2640, which she cites (apparently for the first time) in her opening brief, is plainly inapplicable, as it pertains to reimbursement for contributions to the acquisition of *community* (and quasi-community) property.[4] Appellant does not offer any

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[3] The assertion of an equitable lien does not appear to have been litigated below and will not be addressed.

[4] This statute provides: "(a) 'Contributions to the acquisition of the property,' as used in this section, include downpayments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for

legal basis for reimbursement of her separate property contributions (cf. *Marriage of Cross* (2001) 94 Cal.App.4th 1143), and she admitted that she could not identify how much of her contributions were from community as opposed to separate property. To the extent that she was seeking reimbursement for community contributions, she does not assert that the court failed to make findings on this issue or that any implied findings were legally or factually unsupportable. Instead, appellant assumes that the receipts she gave the court were adequate support for her claim and merely restates the method by which the superior court should calculate the reimbursement amount. This is insufficient to show or even identify any error on appeal.

Disposition

The order is affirmed.

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Elia, Acting P. J.

WE CONCUR:

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Wunderlich, J.

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Mihara, J.

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maintenance, insurance, or taxation of the property. [¶] (b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division."